PREME COURT. U. S.

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No. 290

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provision	3
Statement of the case	3
Reasons for allowance of writ	9
Conclusion	10
Appendix	11
Opinion of the United States Court of Appeals for the Second Circuit	11
Opinion of the United States District Court for the Southern District of New York	23

CITATIONS

Cases:

Belton v. Traynor, 381 F.2d 82 (4th Cir., 1967)	10
Berry v. Pacific Sportfishing, Inc., 371 F.2d 213 (9th Cir. 1967)	9
Burnett v. New York Cent. R.R., 380 U.S. 424 (1965)	8, 9

CITATIONS—*Continued*

Cases: Page

Crown Coat Front Co., Inc. v. United States, 386 U.S. 503 (1967).....6, 7

Crown Coat Front Co., Inc. v. United States, 385 U.S. 811 (1966)..... 7

Crown Coat Front Co., Inc. v. United States, 382 F.2d 407 (2d Cir. 1966)..... 6

Crown Coat Front Co., Inc. v. United States, 275 F.Supp. 10... 8

Honda v. Clark, 386 U.S. 484 (1967).. 9

Len Co. v. United States, 385 F.2d 438 (Ct.Cl., 1967)..... 8

Louisville & Nashville RR v. Dispain, 275 F.2d 25 (6th Cir., 1960)..... 10

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965)..... 9

Nager Electric Co. v. United States, 177 Ct. Cl. 234; 368 F.2d 847 (1966).....7, 9

Northern Metal Co. v. United States, 350 F.2d 833 (1965).....6, 9

Spevack v. United States, 390 F.2d 977 (Ct.Cl., 1968)..... 10

CITATIONS—*Continued*

Cases: Page

Tecon Engineers, Inc. v. United States, 170 Ct. Cl. 389, 349 F.2d 943 (1965)..... 6

United States v. Carlo Bianchi, 370 U.S. 709 (1963)..... 5

United States v. Woodbury, 359 F.2d 370 (9th Cir., 1966)..... 9

United States v. Yellow Cab Co., 340 U.S. 547 (1951)..... 9

Volentine and Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956)..... 5

Statutes:

28 U.S.C. 1254(1)..... 2

28 U.S.C. 1500..... 6

28 U.S.C. 2401(a).....3, 6

41 U.S.C. 321 (Wunderlich Act)..... 5

Administrative decisions:

Appeal of Crown Coat Front Co., Inc. 61-2 BCA §3157 (1961)..... 4

Appeal of Crown Coat Front Co., Inc. 63-1 BCA §3681 (1963)..... 5

Miscellaneous:

Am Dyestuff Reptr 34, 15-6 (Jan. 1945)..... 4

Some Notes on Court of Claims Practice, Saul Richard Gamer, 2 Government Contracts Review 4, 12 (April 1958)..... 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Crown Coat Front Co., Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 14, 1968.

(a) OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, p. 11) is not yet reported. The opinion of the District Court (App., *infra*, p. 23) is reported at 275 F.Supp. 10.

(b) JURISDICTION

(i) The judgment of the Court of Appeals sought to be reviewed was entered May 14, 1968. Petition for rehearing was denied June 11, 1968.

(ii) The jurisdiction of this Court is invoked pursuant to the provision of 28 U.S.C. 1254(1).

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254(1).

(c) QUESTIONS PRESENTED

1. Whether the running of the statutory limitation period on suits against the United States in the District Courts is tolled by a timely action in the Court of Claims.

2. Whether the United States is sovereignly immune from tolling.

3. Whether for a limitation statute to be tolled by concealment, fraud is necessary.

(d) STATUTORY PROVISION

Act of June 25, 1948, 62 Stat. 971, 28 U.S.C. 2401(a):

> "§2401. Time for commencing action against United States.
>
> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

(e) STATEMENT OF THE CASE

On May 14, 1956 petitioner contracted with the United States to furnish a specified number of canteen covers which were to be lined with mildew-resistant dyed felt meeting certain quantitative and qualitative specifications for mildew proofing. The Government, which was authorized to inspect materials to be used under the contract, tested and rejected certain samples of felt purchased by petitioner as deficient in the required contract quantities of DDDM[1] mildew inhibitor. Petitioner agreed to a price

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[1] 2.2' dihydroxy - 5,5' dichlorodiphenyl methane.

reduction, however, and was permitted to complete the contract. Final delivery, originally scheduled for October 11, 1956, was made on December 14, 1956. On March 20, 1959, the Government, which had theretofore concealed the nature of the test made, informed petitioner for the first time that its dyed felt samples had been rejected by a colorimetric test.[2] Contract final payment had long since been made and the *Changes* article of the contract providing for equitable adjustment upon change in specifications required that a claim *"must be asserted prior to final payment under this contract."* Petitioner thereupon claimed refund of prompt payment discounts erroneously taken; his claim was rejected by the contracting officer, on the ground of final payment. On appeal, the ASBCA on September 19, 1961 found final payment not to have been made, that prompt payment discounts had been taken after the prompt payment discount period had expired, and directed repayment to petitioner.[3] Thereupon, the way being cleared for *Changes* article relief, petitioner on October 6, 1961 filed claim for equitable adjustment with the contracting officer; the contracting officer denied

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[2] DDDM extracts from dyed materials are so stained that colorimetric comparison with a standard is impossible; dye bleeds and interferes with complete extraction of DDDm and with reaction: *Am Dyestuff Reptr* 34, 15-6 (Jan. 1945).

[3] *Appeal of Crown Coat Front Co., Inc.*, ASBCA No. 7096, 61-2 BCA §3157 (1961).

the claim, and petitioner's timely appeal was docketed at ASBCA 8090. Since final delivery was made on December 14, 1956 petitioner, being unsure whether it had a *"question of fact"* or a *"question of law"* or a mixed question of law or fact,[4] on December 12, 1962, filed action for damages in the Court of Claims.[5] Petitioner's action, based on the view of the Wunderlich Act, 41 U.S.C. 321-2, expressed in *Volentine and Littleton v. United States*, 136 Ct.Cl. 638, 145 F.Supp. 952 (1956), sought trial de novo. On February 28, 1963 the ASBCA denied petitioner's appeal,[6] ruling that petitioner's claim was under the *Changes* article and subject to the *Disputes* article. On June 3, 1963 *United States v. Carlo Bianchi*, 370 U.S. 709 (1963) explicitly overruled *Volentine and Littleton v. United States, supra*: 380 U.S. at 712. Petitioner was thereunder not entitled to trial de novo and was limited to judicial review of the administrative record at ASBCA 8090, *supra*. Petitioner, thereupon, brought this action in the District Court below at 63 Civ. 2281, on July 31, 1963 seeking judicial review and equitable adjustment, and on August 19, 1963 moved the Court of Claims to suspend its proceeding

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4 See *Some Notes on Court of Claims Practice*, Saul Richard Gamer, 2 Government Contracts Review 4, 12 (April, 1958).

5 *Crown Coat Front Company, Inc. v. United States*, Ct.Cl. No. 395-62.

6 *Appeal of Crown Coat Front Co., Inc.*, ASBCA No. 8090, 63-1 BCA §3681 (1963).

at 395-62 by virtue of such District Court action. The Government moved to dismiss on the merits on the ground that since plaintiff's action in the Court of Claims on December 12, 1962 was followed by the District Court action on July 31, 1963, the Court of Claims lacked jurisdiction under 28 U.S.C. §1500.[7] On September 20, 1963 the Court of Claims entered an order allowing the Government's motion to dismiss, without prejudice. The District Court below on January 29, 1965 dismissed the Suit below at 63 Civ. 2281, *supra*, as barred by the statute of limitations.[8] The Court of Appeals affirmed[9] on the ground that the cause of action first accrued no later than December 14, 1956, the date of the final delivery of the disputed canteen covers, and was therefore time barred by 28 U.S.C. §2401(a). Because of conflict with *Northern Metal Co. v. United States*, 350 F.2d 833 (3d Cir., 1965) ruling that the statute was tolled during the pendency of the administrative proceedings, this Court on October 10, 1966

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[7] The Government made the contrary contention and was sustained upon an exhaustive analysis of 28 U.S.C. §1500 in *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389, 349 F.2d 943 (1965).

[8] The District Court's opinion, per Ryan, Ch. J., not reported, appears in the Record, pp. 7-13, *Crown Coat Front Co. Inc. v. United States*, Oct. Term, 1966, No. 371, 386 U.S. 503 (1967).

[9] *Crown Coat Front Co., Inc. v. United States*, 382 F.2d 407 (2d Cir. 1966).

granted certiorari.[10] This Court then after briefs and argument, and noting the decision *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 368 F.2d 847 (Oct. 14, 1966) opinion per Davis, J., reversed[11] and in its opinion per Mr. Justice White concluded, 386 U.S. at 522, that if the claim filed by petitioner was a claim *"arising under"* the contract and was therefore subject to administrative determination, his right to bring a civil action first accrued when the ASBCA finally ruled on his claim, and his suit in the District Court was timely filed; but that the Government characterized the claim as a pure breach of contract claim which accrued no later than the date of contract completion; that the District Court had not decided this issue, nor did this Court; that the matter would be open on remand to the District Court, and if the claim were not within the disputes clause, the District Court might then determine whether it was time barred.

Upon remand, petitioner, which as the proceedings below indicate, had been uncertain, concluded that its claim was for breach of contract and moved to amend so

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[10] *Crown Coat Front Co., Inc. v. United States*, 385 U.S. 811 (1966): See *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 509 (1967).

[11] *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503 (1967).

as to thus claim.[12] Petitioner contended that the limitation period was tolled by the timely suit in the Court of Claims, *supra*, citing *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965). The District Court denied the motion to amend, and dismissed the complaint as time-barred,[13] ruling that the United States possessed sovereign immunity from tolling (App., *infra*, p.34) and that the Government concealment of the colorimetric test it made upon petitioner's dyed felt, did not toll the statute since it was not fraudulent (App., *infra*, p.35). On appeal, the Court of Appeals for the Second Circuit on May 14, 1968 affirmed, approving the District Court's opinion that the limitation statute could not be tolled by reason of the sovereign immunity of the United States (App., *infra*, p.21) as well as that concealment must be fraudulent to toll the statute (App., *infra*, p. 20) and that petitioner should have urged the principle of *Burnett v. New York Cent. R.R.*, *supra*, decided April 5, 1965, when before Chief Judge Ryan of the District Court, whose decision was rendered January 29, 1965 (App., *infra*, p. 21).

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[12] Petitioner's belief was confirmed by *Len Co. v. United States*, 385 F.2d 438 (Ct. Cl., 1967), opinion by Davis, J. There was no change in the work called for, but only a delay in performance.

[13] *Crown Coat Front Co., Inc. v. United States*, 275 F.Supp. 10.

REASONS FOR ALLOWANCE OF WRIT

1. The Court of Appeals' determination that the limitation period was not tolled by petitioner's timely action in the Court of Claims is contrary to *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965) and with *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) and is in conflict with *United States v. Woodbury*, 359 F.2d 370 (9th Cir., 1966) and with *Berry v. Pacific Sportfishing, Inc.*, 371 F.2d 213 (9th Cir., 1967). The Court's statement (App., *infra*, p. 21) that petitioner should have raised this issue *"the first time around"* ignores the fact that *"the first time around"* was Chief Judge Ryan's decision of January 29, 1965 when petitioner could not have argued upon the authority of *Burnett v. New York Cent. R.R., supra*, decided April 5, 1965. This reason advanced by the Court of Appeals for not following *Burnett v. New York Cent. R.R., supra*, is clearly not a valid one.

2. The Court of Appeals' determination that the respondent is sovereignly immune from tolling[14] is contrary to *Honda v. Clark*, 386 U.S. 484 (1967) and with *United States v. Yellow Cab Co.*, 340 U.S. 547 (1951), and is in conflict with *Northern Metal Co. v. United States*, 350 F.2d 833 (3rd Cir., 1965) and with *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 368 F.2d 847 (1966).

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[14] App., *infra*, p. 21.

3. The Court of Appeals' determination that respondent's concealment of the colorimetric test it had made upon petitioner's dyed felt for mildew proof inhibitor content, did not toll the running of the limitation period, because not fraudulent,[15] is in conflict with *Spevack v. United States*, 390 F.2d 977 (Ct.Cl. 1968); with *Belton v. Traynor*, 381 F.2d 82 (4th Cir., 1967); and with *Louisville & Nashville RR v. Dispain*, 275 F.2d 25 (6th Cir., 1960).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

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[15] App., *infra*, p. 20.